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IN THE

Supreme Court of the United States

_____ TERM, 1967

No. [redacted]-170 S.

JOE D. MORGAN and JACK THORNTON, a partnership d/b/a M & T Gum Machine Company, and JOE D. MORGAN and JACK THORNTON, individually,

Appellants,

versus

STATE OF ALABAMA

Appellee.

ON APPEAL FROM THE SUPREME COURT OF ALABAMA
3 Div. 223

MOTION TO DISMISS APPEAL AND MOTION TO AFFIRM

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Appellants,

versus

STATE OF ALABAMA,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF ALABAMA 3 Div. 223

MOTION TO DISMISS APPEAL AND MOTION TO AFFIRM

Appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that the appeal in this cause be dismissed and in the alternative that the decree of the Supreme Court of Alabama in this cause be affirmed on the grounds that there are no substantial Federal questions presented, and that this cause involves only an interpretation of a state license tax statute and a question of the applicability of such statute to the Appellants, which are purely local

matters, and matters over which this Court has repeatedly held that the state courts have final jurisdiction.

OPINIONS BELOW

This cause originated as an appeal taken under the provisions of Title 51, Section 140, Code of Alabama 1940, from four final assessments of vending machine license taxes levied under Title 51, Section 613, as amended, Code of Alabama 1940, which the State of Alabama acting through its agency and instrumentality, the State Department of Revenue made against the Appellants as the alleged operators of certain coin-in-the-slot vending machines within the state. The appeal as authorized under Section 140, as amended, supra, was taken by the Appellants to the Circuit Court of Montgomery County, Alabama, in Equity.

The Circuit Court of Montgomery County affirmed the four assessments and judgments made by the State Department of Revenue in comprehensive findings, conclusions, and a final decree, which on appeal were adopted in their entirety and affirmed in every respect. (See Appendix "A," page 36 of Appellants' Jurisdictional Statement and Brief, which is the decision of the Alabama Supreme Court, which adopts in their entirety the opinion and final decree of the Circuit Court.)

In its opinion the Supreme Court of Alabama made the following conclusions of law:

> "1. The appellants as owners of the vending machines involved and the gumballs vended thereby, kept the machines supplied with gumballs and otherwise serviced the machines and controlled their operation, as well as having taken the pennies therefrom as the owners thereof, were the operators of the machines as the term 'operator' is used in Title 51, Section 613, Code 1940, Recompiled 1958, and as such were liable for the license levied thereby for the operation of each of the vending machines included in the final assessments.

"2. The legislature in enacting the proviso in Section 613 which is under consideration in this case, and in providing that the 'establishment shall be conclusively presumed to be the operator of the machine', where an unlicensed vending machine is found in the establishment, appears under the circumstances to have clearly used the word 'shall' as being merely permissive and as the equivalent of 'may', and thus intended the conclusion to be a rebuttable one, where there was evidence to the contrary.

"3. To construe the word 'shall' as used in said proviso in the sense of being imperative or mandatory, and the presumption to be a conclusive and irrefutable one would cause the proviso to be unconstitutional, as being in conflict with the Due Process Clause of the Federal Constitution and comparable provisions of the State Constitution."

The Supreme Court of Alabama denied the Appellants' Application for Rehearing in this cause on February 16, 1967.

JURISDICTION

This cause involves only the construction and the applicability of a state license tax statute, and is purely of local concern. This Court has time and time again held that the meaning of state statutes is purely a matter for the state courts to decide.

"Who in a particular transaction like the present, is a 'purchaser' within the meaning of the statute, is a question of state law on which only the Supreme Court of Alabama can speak with final authority."

Alabama v. King & Boozer, 314 U.S. 1, at pages 9 and 10, 62 S.Ct. 43, at page 46.

"The interpretation of state law by the Court of Appeals, in an opinion by its Alabama member, was rendered in advance of construction of the License

Code by the courts of the state, which alone, of course, can define its authoritative meaning."

United Gas Pipe Line Company v. Ideal Cement Company, 369 U.S. 134, at page 135, 82 S.Ct. 676, at page 677.

Under the topic "Jurisdiction" in their statement as to jurisdiction the Appellants have simply stated the general authority of this Court to review decisions of the Supreme Court of Alabama and other State Supreme Courts. We certainly have no dispute with that proposition, but say that it is beside the point in this case. This Court has repeatedly refused to review cases calling for purely the construction of state or other local laws, and where no substantial Federal question is said to be involved. Standard Dredging Corporation v. Alabama, 364 U.S. 300, among a host of others. Here we stress the fact that this Court has in the past refused to take jurisdiction in such cases, where no substantial Federal question is involved, and has left the construction of purely local statutes up to the state courts.

STATUTES INVOLVED

The statute involved is Title 51, Section 613, as amended, Code of Alabama 1940, and as the statute read prior to the 1963 amendment thereto. The statute as material to this cause is correctly quoted in its entirety by the Appellants as Appendix "B," page 36, in the back of their "Statement as to Jurisdiction" and brief in support thereof.

The most pertinent part of the statute, however, is quoted as follows:

"The licenses herein provided for shall be levied upon the operator of the machine, the coin-operated radio, or the central point or studio from which point or studio the music is transmitted; provided, however, that in the

> event any unlicensed machine, coin-operated radio, transmitter or speaker is found in any establishment or place of business, the operator of such establishment or place of business shall be conclusively presumed to be the operator of such machine, coin-operated radio, transmitter or speaker and shall be liable for the license therefor." (Emphasis supplied)

The license tax as to vending machines is clearly and expressly levied on "the operator of the machine." The Statute has also been so interpreted, administered and enforced over a number of years. State v. Wood, 242 Ala. 184, 5 So.2d 732, 735, and Quarterly Report of the Attorney General (Alabama), Volume 55, page 29.

The definition of the word "operator" which has been used in administering and enforcing said vending machine license tax statute for the past ten years is that contained in a directive issued by said Department on May 9, 1957, and circulated at the time by it being distributed to all members of the field force of said Department as well as to members of the vending machine trade in the State. (See Appendix "A," pages 39 and 40, in the back of Appellants' "Statement as to Jurisdiction" and brief in support thereof.)

> "'May 9, 1957
>
> "'TO ALL FIELD MEN
>
> "'The definition of the word "operator" as interpreted by our Legal Division includes, but is not necessarily limited to, the person who owns or exercises control of the vending machine and services said machine, whether or not the machine is placed in operation on a commission or rental basis.'"

The evidence is unrefuted, and in fact the Appellants in effect admit (see pages 38 and 39 of Appendix "A," in back of the Appellants' Jurisdictional Statement) that they owned the gum ball vending machines involved, owned the gum vended

thereby, keep the machines in repair and in every respect, serviced the machines, and took the money therefrom. In the contract between the Appellants and the Ford Gum Company (see stipulation of the parties, also pages 38 and 39, Appendix "A," in back of Appellants' Jurisdictional Statement), the Appellants were also designated and referred to as the "operator" of the vending machines involved. Under the uncontradicted evidence then the Appellants were as a matter of fact the actual operators of said vending machines, and the Alabama courts have so held.

Normally then, and if the license tax on the vending machines had been paid before the license became delinquent, under the plain wording of the statute the Appellants as the actual operators of the machines would have been the ones who paid these taxes, and under the statute would have undisputedly been the ones on whom the license tax fell. However, it is only because these licenses became delinquent, and because the Appellants' said vending machines were found unlicensed in the stores and other places of business which had gratuitously allowed the Appellants to place them there, that the proviso as quoted above and taken from Section 613, as amended, supra, is said to be operative. That is, as Appellants' vending machines were found by the agents of the state to be unlicensed in said business establishments, where the proprietors had gratuitously allowed the Appellants' to place same, Appellants contend that said proviso has been brought into play, and that the proprietors were due to pay the licenses and not the Appellants. And that as the proviso is alleged by the Appellants to contain a conclusive presumption, the Appellants contend that such is final and that the proprietors (who are actually victims of circumstance) would have no right to refute such presumption or to prove that they are not the real or actual operators of the vending machines.

The foregoing being considered, we agree with the Circuit Court and the Supreme Court of Alabama, that the Alabama Legislature in enacting the proviso had no such intentions. (See pages 41 - 43, inclusive, of Appendix "A," in back of Appellants' Jurisdictional Statement.)

While arguments under the topic "Statutes Involved" seem out of place, as the Appellants have attempted to argue the case under this topic in addition to citing and referring to the applicable statutes, we will make a brief reply thereto.

We do not exactly understand the contentions of the Appellants under this topic that the State's construction of said proviso would give the statute retrospective effect, or would cause this portion of the statute to be violative of the Article 1, Section 10 of the Constitution of the United States as an ex post facto[1] law. There is no evidence in the record whatsoever on the part of the Appellants that the construction placed on the applicable provisions of this statute by those charged with its administration and enforcement, including the Alabama Department of Revenue and the Alabama Attorney General, was ever changed or that the presumption was ever construed other than as a rebuttable one and as a prima facie presumption. That is, other than to give the operator of a store or other establishment in which an unlicensed vending machine is found his day in court and the right to refute the presumption and to establish by proper proof that he is not the actual operator of the vending machine, upon whom the license tax is expressly said to fall under Title 51, Section 613, as amended,

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[1] The burden of proof under the statute, Title 51, Section 140, Code of Alabama 1940, Recompiled 1958, authorizing appeals to the Circuit Court in Equity from final assessments made by the State Department of Revenue, is expressly placed on the Appellant to show such assessments to be invalid or incorrect.

Code of Alabama 1940. Such an interpretation of the proviso seems especially applicable in this cause in view of Appellants contention that the storekeepers and other owners of the establishments, who graciously allowed the Appellants to place the machines in their places of business as an accommodation and without charge (innocent bystanders), were liable for the tax.

The proviso and the portion of the statute quoted above in this topic, and which is under consideration here, was inserted in Title 51, Section 613, supra, by amendment in 1947. (General Acts of Alabama 1947, page 522, Act No. 688 approved October 7, 1947.) This proviso has been in Section 613 then for the past twenty years. From aught that the evidence shows (the burden of proof being on the Appellants) there has been no change in the interpretation of the proviso as creating only a rebuttable and prima facie presumption since its enactment in 1947. The Circuit Court of Montgomery County found as a matter of fact, and this was affirmed by the Alabama Supreme Court (Appendix "A" to Appellants' Jurisdictional Statement, page 44), that there was no evidence or proof on the part of the Appellants that there was ever any change made in the interpretation of the proviso by those charged with its enforcement, or that the proviso had ever been interpreted to exempt from the vending machine license tax those having the status[2] of the Appellants (in allegedly paying twenty percent of their profits from the vending machines to civic clubs as "Sponsors," to be used by them for charitable purposes), where such persons were the actual operators of the vending machines

[2] There was no provision in Title 51, Section 613, as amended, supra, or the license tax laws of Alabama exempting or excepting from the vending machine license tax at any time pertinent to this case any vending machine operator giving a part of the proceeds or profits from the operation of such machines to charity.

involved. See Stipulation of the Parties, and Appendix "A" to Appellants' Jurisdictional Statement, pages 38, 39 and 44.

The duty to know the law and their status under the statute, and to pay the tax without being prodded or cited by agents of the State, was clearly upon the Appellants. Griffin v. Edwards, as Commissioner of Revenue, 260 Ala. 12, 68 So.2d 705, 708, 709.

The contentions made by the Appellants in this respect are pure conclusions on their part unsupported by any lawful evidence.

The Appellants under this topic also contend that the Alabama Revenue Department, and presumably also the Circuit Court and Alabama Supreme Court, have usurped the powers of the legislature in interpreting the applicable provisions of the statute to create only a refutable or prima facie presumption. This also is pure conjecture on the part of the Appellants, but we will treat with this contention more fully under other and more appropriate topics.

QUESTIONS PRESENTED

In their attempt to argue the case prior to stating the alleged questions involved under this topic, the Appellants assert that as construed by the courts, Title 51, Section 613, as amended, Code of Alabama 1940, would permit the Alabama Revenue Department in enforcing the statutes as against the "operator of the machine," to arbitrarily do so against "whomever it may more easily catch." This presupposes that all operators of vending machines are attempting to evade the payment of the tax, which is certainly not the case. The great majority of vending machine "operators" timely pay the tax. The tax dodger is clearly the exception, and the proviso under Section 613 very seldom becomes operative. It is indeed the exception.

The tax is usually and normally paid before it becomes delinquent by the actual "operator of the machine," on whom the license tax statute expressly provides that the tax is to fall.

The Alabama Department of Revenue under the provisions of Title 51, Section 131, Code of Alabama 1940, is both impowered and directed by the Alabama Legislature to collect and enforce the collection of all state property, franchise, privilege and license taxes. Under subsections (a) and (p) of Title 51, Section 131, supra, the State Department of Revenue is also both authorized and directed by the legislature to make assessments of all taxes or penalties it is authorized to enforce or collect. In doing so the Department is said to have powers of a judicial nature and to function as a court, and has been so constituted by the Alabama Legislature as authorized under Section 139 of the Alabama Constitution of 1901. Ex parte State ex rel. Attorney General, 252 Ala. 149, 39 So.2d 669, Birmingham Vending Company v. State of Alabama, 251 Ala. 584, 588, 38 So.2d 876, 879, State v. Woodroof, 253 Ala. 620, 46 So.2d 553, among others.

Moreover, Title 51, Section 140, Code of Alabama 1940, provides an adequate and speedy procedure by way of appeal, from all final assessments made by the State Department of Revenue as to license and other taxes, and which appeals are authorized to be taken from said final assessments of the Department to the Circuit Court, in Equity, to the Supreme Court of Alabama, and ultimately to this Court if a sufficient Federal question is involved.

The above mentioned procedure as is prescribed by Title 51, Section 140, supra, would not only give the taxpayer his day in court, but several days in court if he so elects. Due Process is clearly and adequately met under the circumstances. The Alabama Supreme Court has so held, and has also upheld the procedure prescribed under Section 140, supra, as affording

adequate relief and Due Process, and in no respect offending either the State or Federal Constitutions. Ex parte State ex rel. Attorney General, 252 Ala. 149, 39 So.2d 669, State of Alabama v. Woodroof, 253 Ala. 620, 43 So.2d 533, among others.

The procedure provided for by way of appeals from final assessments in Alabama is of long standing in this State antedating even the Alabama Code of 1940. It has withstood the test of time and attacks in court. Ex parte State ex rel. Attorney General, supra, among the other cases cited.

In adopting such procedure the Alabama Legislature some thirty years ago is said to have copied same substantially from California and some of the other states. This procedure follows in principle the Federal tax procedure and also that of most of the other states of this Union.

We cannot go along with the Appellants and their alleged questions presented, which alleged questions have been outlined under "Questions Presented," and are contained on pages 8 and 9 of their Jurisdictional Statement. We cannot agree that at this point in the case that they really are questions involved or which are actually presented. We see them only as straw men which can be readily brushed aside when the real facts are considered in the light of Section 613 of Title 51, supra, and the other State Statutes involved. They certainly would not involve any substantial Federal questions, and again we say that this case in the final analysis involves only the construction of a State Statute, which this Court has repeatedly held to be only of local concern, and a matter for the state courts to decide. The state courts have made their decisions already in this cause and the question has now been resolved. See Appendix "A" to the Appellants' Jurisdictional Statement, pages 36 - 46, inclusive.

STATEMENT OF THE CASE

We do not have much, if any, quarrel with what has been said by the Appellants under their "Statement of the Case," which we also presume covers the Statement of the Facts, as there is no separate Statement of the Facts in Appellants' Jurisdictional Statement. We, therefore, will adopt much of what has been said by the Appellants under this topic, without reiterating such statements. However, we do wish to make a few additions in this respect, and to also clarify and expand on a few of the statements made under this topic by the Appellants.

The various vending machine licenses, including those on penny gum ball vending machines, which are levied under Title 51, Section 613, as amended in 1947 Code of Alabama 1940 (Appendix "B," page 48, Appellants' Jurisdictional Statement) are certainly not levied just on unlicensed machines, but are levied on all coin-in-the-slot vending machines, and the Appellants' statement to the effect that the license is levied on unlicensed machines is not correct. The license tax is levied under Section 613 on all of the vending machines described therein, and expressly on the actual operator of the vending machine. (See Appendix "B," page 48, of Appellants' Jurisdictional Statement.)

Where the license is not delinquent, which is certainly the usual case (the unlicensed machine being clearly the exception), the actual and real operator of the machine is the one whom the statute designates as the taxpayer.[3]

If the Appellants' vending machines had not been found to be unlicensed and the tax delinquent, then the Appellants as the

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[3] "The license herein provided for shall be levied upon the operator of the machine . . ." (See top of page 49, Appendix "B," Appellants' Jurisdictional Statement, for said levying part of Title 51, Section 613, as amended, Code of Alabama 1940.) (Emphasis supplied)

actual owners and operators of said vending machines would without any dispute have been the taxpayers. It is only because of the fact that Appellants' vending machines were found to be unlicensed in the various stores and places of business that the proviso under consideration came into the picture at all.

It is also ironical in this respect that the stores and other places of business in which Appellants' unlicensed vending machines were found, had, through solicitations made by the "Sponsors," the civic clubs, and through the representations made that twenty percent of the proceeds therefrom would go to a worthy charity, allowed the Appellants to place and operate their vending machines in the storekeepers' places of business as an accommodation to the Appellants and without any charge. Appellants contend, however, that as their vending machines were unlicensed, under the circumstances, and under the presumption contained in the proviso in Section 613, the storekeepers, as the owners of the establishments in which the unlicensed machines were found, were due to pay the tax and not the Appellants.

We also disagree that the Appellee has just in this case taken the position that to construe the presumption contained in the pertinent proviso in Section 613 of Title 51 (Appendix "B," top of page 49, Jurisdictional Statement) to be a conclusive presumption and thus pin the license tax on the storekeepers, in whose places of business the Appellants' unlicensed vending machines are found without giving them an opportunity to refute same and prove otherwise, would violate the Due Process Clause of the Fourteenth Amendment of the United States Constitution, and comparable provisions of the Alabama Constitution of 1901. This is Appellee's contention, but it certainly did not originate in this case. It has been the State Department of Revenue's interpretation in administering and in enforcing the statute over the years.

From aught that appears in the evidence in this case (the burden of proof is on the Appellants) the foregoing has been the contention of the State of Alabama since the enactment of the proviso and amendment to Section 613 in 1947 (General Acts of Alabama 1947, page 522, Act No. 688, approved October 7, 1947), that the presumption is a rebuttable one where it is possible by proper proof to establish who the actual operator of the vending machine really is. The presumption in this respect being a matter of evidence and affecting the proof as to who is the actual operator of the vending machine, this construction of the proviso appears to be the only one which would under the Fourteenth Amendment give validity to this part of the statute.

It is obvious that the Legislature did not intend to deprive the storekeepers of their day in Court. This is particularly true as Section 613 has repeatedly been construed to levy the license on the actual operator of the vending machine, and the obvious legislative intent is to make the actual operator of the vending machine the taxpayer. State v. Wood, 242 Ala. 184, 5 So.2d 732, Quarterly Reports of the Attorney General (Alabama), Volumes 55 and 84, pages 29, 32 and 33, respectively:

The facts of the case are for the most part contained in the Stipulation of the Parties, which has been certified as a part of the record. Important excerpts from the facts and stipulation are referred to on pages 38, 39 and 40 of Appendix "A," in the back of the Appellants' Jurisdictional Statement.

THERE ARE NO SUBSTANTIAL FEDERAL QUESTIONS INVOLVED

The matters set forth under Appellants' topic entitled "The Questions Presented Are Substantial," fail to show that there are any substantial Federal questions involved.

The amendment to the pertinent proviso in Section 613 referred to and quoted in material part by the Appellants on page 13 of their Jurisdictional Statement, the 1965 amendment (Act No. 46, of the Second Special Session of the Alabama Legislature of 1965, approved September 23, 1965), is not applicable in this case. The final assessments from which the Appellants have appealed cover periods from October 1, 1958 through September 30, 1961, and the 1965 amendment to Section 613 was enacted some four years after this period had ended.

The 1965 amendment, thus, is not material or involved in this case.

It is very significant that in amending Section 613 in 1965, and subsequent to the period of time involved in this case, the legislature obviously attempted to remove from the statute any reference to the presumption provided for therein being a conclusive presumption, as it deleted from the proviso the words "shall be conclusively presumed," clearly showing such intent.

The decisions of the Circuit Court and also the Supreme Court of Alabama (Appendix "A," pages 36 - 46, inclusive, in Appellants' Jurisdictional Statement) would also appear to be just as applicable to the statute after the 1965 amendment as they were before. The results would be the same.

The matter of the authoritative meaning of the proviso in Section 613 both before and after the 1965 amendment, does not involve a Federal question, but is one that only the State Courts can determine. **Alabama v. King and Boozer**, 314 U.S. 1, at pages 9 and 10, 62 S.Ct. 43, at page 46, **United Gas Pipe Line Company v. Ideal Cement Company**, 369 U.S. 134, at page 135, 82 S.Ct. 676, at page 677.

The Appellants here argue with the Supreme Court of Alabama and its decision in this cause, but that Court has been said by this Court to have the right to determine the authoritative

meaning of the statute, which it has clearly done. This is purely a state matter, and there is no substantial Federal question involved.

THE STATE HAS MADE NO ATTEMPT TO ATTACK THE STATUTE, BUT HAS ATTEMPTED ONLY TO ARRIVE AT THE TRUE LEGISLATIVE INTENT, IN ORDER TO PROTECT THE STATUTE AND GIVE IT VALIDITY.

The Appellants in stating that the State may not attack its own statute, seem a bit confused. There is no evidence or indication that the State has made an attack on this statute. It has only attempted to construe the statute in such a way as to arrive at the true legislative intent, and to interpret it in such a way as to remove any doubt concerning its validity.

In fact the State Department of Revenue has construed the statute in the same way for approximately the past twenty years. Its interpretation of the statute in this respect is certainly nothing new. In fact the Attorney General of Alabama some ten years ago, and on September 6, 1956, in an official opinion, gave the proviso inserted in Section 613 by amendment in 1947, the same interpretation which the Department has given it for approximately the past twenty years.

> "It is, therefore, my opinion that the presumption under consideration could not be construed to be a conclusive one where evidence and proof can be introduced, and is introduced, by either the taxpayer or the state as to who is the actual operator of the vending machine in such cases."
>
> Quarterly Report of the Attorney General (Alabama), Volume 84, pages 29, 33.

Actually the license statute itself, Section 613, is not at issue. The controversy arises only as to the 1947 amendment and proviso, and where an unlicensed machine is found in a business establishment. The Appellants' statement that it is

the State that relies on the proviso is simply not correct. It is the Appellants who rely on the proviso, and who are attempting through the proviso to pin the license tax on the storekeepers in whose establishments the Appellants' unlicensed vending machines were found, and without giving the storekeepers the chance to prove that they are not the operators of the unlicensed vending machines.

Actually the license tax statute itself, Section 613, as amended, supra, is fully operative without the said proviso, and could function very effectively without it. If the proviso were stricken or declared to be unconstitutional, Section 613 would still stand and would not be affected thereby. Therefore, insofar as the license tax statute itself is concerned, the State would not be detrimented in the least if the proviso referred to was declared to be unconstitutional or stricken from the statute. Notwithstanding, the State Department of Revenue has practically since the proviso was inserted into Section 613 by way of amendment in 1947, construed the proviso to constitute in effect a rule of evidence, and the presumption contained therein to be a rebuttable one, and one which would allow the storekeeper to refute same by competent evidence. This would seem in full keeping with Due Process and to remove any doubt concerning the validity of the statute. It seems significant that this was also the interpretation placed on the proviso by both the Circuit Court of Montgomery County and the Supreme Court of Alabama. See Appendix "A," pages 42, 43, and 45, in Appellants' Jurisdictional Statement.

Another misconception and error on the part of the Appellants is to treat the State Department of Revenue, in making these assessments of license taxes against them, as only a ministerial body or officer. The Department in this respect actually functions in making assessments of license as well as other taxes as a Court, and has been repeatedly held in this respect to have powers of a judicial nature. State v. Woodroof, 253

Ala. 620, 46 So.2d 553, Ex parte State ex rel. Attorney General, 252 Ala. 149, 39 So.2d 669, 671, Birmingham Vending Machine Company v. State, 251 Ala. 584, 588, 38 So.2d 876, 879, among others.

> "Under Section 139 of the Constitution of Alabama of 1901, it was within the legislative competency to confer on the Department of Revenue 'powers of a judicial nature' authorizing that Department to assess taxes and penalties for violations of the taxing statutes, which that department was created to enforce (citing several cases) . . . That 'powers of a judicial nature' were conferred upon the Department of Revenue by the act of its creation is not open to question (citing numerous cases)." (Emphasis supplied)
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> Ex parte State ex rel. Attorney General, 252 Ala. 149, 39 So.2d 669, 671.
> See also Title 51, Section 131, Code of Alabama 1940.
>
> "The Department of Revenue administered by the Commissioner is the State tribunal designated by law with judicial functions to pass upon questions of fact or law which may arise in making an assessment." (Emphasis supplied)
>
> Birmingham Vending Machine Company v. State, 251 Ala. 584, 588, 38 So.2d 876, 879.
>
> "The final assessment not appealed from is as conclusive as the judgment of an ordinary court. It is the judgment of a tribunal constituted a court by the legislature as authorized under section 139 of the Constitution (Alabama 1901), and is conclusive as such." (Emphasis supplied)
>
> State v. Woodroof, 253 Ala. 620, 46 So.2d 553.

From the assessments and judgments so made by the State Department of Revenue there is a complete remedy by way of appeal to the Circuit Court, in Equity, and to the Supreme Court of Alabama, which proscribed procedure the Appellants

have pursued in this case. See Title 51, Section 140, Code of Alabama 1940.

What the Appellants are actually saying under their topic corresponding to this topic, is that in determining who the taxpayer is under the proviso the State Department of Revenue in making the assessments[4] had no authority to construe or interpret the proviso or for that matter any other taxing statute. This is entirely inconsistent with the holdings of the Alabama Supreme Court on the same subject matter. In interpreting Section 139 of the Alabama Constitution of 1901 with Title 51, Sections 131, 140 and other state statutes, Code of Alabama 1940, the Alabama Supreme Court in Woodroof, Ex parte State ex rel. Attorney General, Birmingham Vending Machine Company and other cases has repeatedly held in making assessments it is the duty of the State Department of Revenue "to pass upon questions of fact or law which may arise . . ." Birmingham Vending Company v. State, supra, 38 So.2d at page 879.

It is not only the right of the Department to consider the facts and the law in making these tax assessments, it is its duty in functioning as a Court in this respect. In making these assessments the very vital thing to be determined by the Department was who the "operator" of the vending machines was, as was required under Section 613.

The Appellants are laboring under a misconception here when they contend that the State Department of Revenue has no authority to construe or interpret the statute in making the

[4] In making the assessments the Appellants under Title 51, Section 131, Code of Alabama 1940, and the applicable state statutes, were given a full hearing before the State Department of Revenue and presented documentary and other evidence, and their cases were also argued by their counsel, all of which was considered by the Department, before making its determination, and entering the assessments.

assessments. The Supreme Court of this State has repeatedly held otherwise and that such powers have been conferred upon the Department by the legislature as authorized under Section 139 of the Alabama Constitution 1901 (Code of Alabama Recompiled 1958, Volume 1, page 198). State Tax Commission v. Bailey, 179 Ala. 620, 60 So. 913, Ex parte State ex rel. Attorney General, 252 Ala. 149, 39 So.2d 669, 671, and other cases hereinabove cited.

There is certainly no evidence that the state has attacked the statute, or has done otherwise than to attempt to properly construe and interpret the statute to arrive at the true legislative intent. Moreover, the fact that it has the right to construe the statute and has properly done so in this case has been confirmed by both the Circuit Court of Montgomery County and the Alabama Supreme Court.

The foregoing being considered then the cases cited by the Appellants under this topic are all inapplicable and beside the point. It is also obvious when properly considered, that these matters resolve themselves to questions of purely state and local concern.

THE PROVISO UNDER SECTION 613, IF CONSTRUED TO BE A CONCLUSIVE ONE, WOULD VIOLATE DUE PROCESS.

The proviso in Section 613, as amended, supra, relating to the presumption where an unlicensed machine is found in a business establishment, is clearly a matter of evidence, and to determine that it was a conclusive presumption would do more than harm the evidence, it would completely defeat or destroy the right to introduce competent evidence to refute same or to prove otherwise.

Three State Courts, including the Alabama Supreme Court, have in this cause held that the proviso affects the evidence and the right to introduce evidence in rebuttal. These Courts

also determined under the circumstances that to construe the proviso to provide other than a prima facie presumption would cause it to be in conflict with Due Process and invalid.

These Courts have repudiated Appellants' argument made each time as here under this topic that the presumption in Section 613 is merely a rule of substantive law, dispensing with certain elements in the chain of proof. To construe the proviso here to provide a conclusive presumption, would not dispense with just certain elements in the chain of proof, it would dispense with all proof, and completely destroy any right of rebuttal. Under the well established rule then such a presumption cannot be allowed to stand under the Due Process Clauses of either the Fourteenth Amendment to the United States Constitution or Section 6 of the Alabama Constitution of 1901. 51 A.L.R. 1149 and 1150, 162 A.L.R. 517, and 12 Am. Jur., Constitutional Law, Section 625, page 317, and numerous cases cited.

This also seems particularly applicable in this case, as is pointed out by the Appellants, the Alabama License Tax Laws provide criminal penalties for delinquency as well as civil liability. See Title 51, Section 834, Code of Alabama 1940; 12 Am. Jur., Constitutional Law, Sections 628 and 629, page 320.

Moreover, like in criminal matters, conclusive presumptions appear to be particularly offensive in taxing statutes, and the doctrine that such presumptions violate Due Process appears to be especially applicable to tax laws. 12 Am. Jur., Constitutional Law, Section 628, page 320; see also Handy v. Delaware Trust Co., 285 U.S. 352, 52 S.Ct. 371, United States v. Provident Trust Co., 291 U.S. 272, 54 S.Ct. 389, among others.

Where a conclusive presumption would cut off the right of proof, or even damage the evidence, as it would do in this cause, if the proviso in Section 613 is construed to be a conclusive one, the cases without any exception hold such

presumption to be, if so applied, in violation of the Fourteenth Amendment.

Schlesinger v. Wisconsin, 270 U.S. 230, 46 S.Ct. 260.
Hoeper v. Tax Commission of Wisconsin, et al., 284 U.S. 206, 52 S.Ct. 121, 122.
Heiner v. Donnan, 285 U.S. 312, 52 S.Ct. 358, 360.
United States v. Provident Trust Co., 291 U.S. 272, 54 S.Ct. 389, 392.

The Alabama Courts have also held under the circumstances that such a presumption not only violates the Fourteenth Amendment, but also violates the comparable provisions of the Alabama Constitution, namely, Section 6 of the Alabama Constitution of 1901.

Zeigler v. South and North R. R. Co., 58 Ala. 594.
Pike v. Southern Bell Telephone and Telegraph Co., 263 Ala. 59, 81 So.2d 254.

"If any question of fact or liability be conclusively presumed against him, this is not due process of law.

"We have held that it is within the power of legislation to declare that certain proofs shall be prima facie evidence of specific facts. But, at the same time, we decided that the legislature could not constitutionally ordain that such proofs should be conclusive evidence of material facts in controversy. The first is a mere rule evidence. The last has been characterized as 'a confiscation of property.' See Staudenmire v. Brown, 48 Ala. 699; Davis v. Minge, 56 Ala. 121; Oliver v. Robinson, at present term (58 Ala.46)."

Zeigler v. South and North Alabama R. R. Co., 58 Ala. 594, at page 599.

To conclusively presume a storekeeper to be the operator of a vending machine which he has no part whatsoever in operating, and where he derives no possible benefits therefrom, merely because it is found to be unlicensed in his establishment, and not allow him to introduce any evidence to

ove otherwise, is capricious, arbitrary and unjust, and the abama Legislature in inserting the proviso in Section 613 way of amendment in 1947 obviously did not intend the esumption to be a conclusive one. Particularly does this pear to be so in the light of the numerous Federal and State cisions of which the legislature must have been fully aware the time it enacted the amendment, and which hold that a nclusive presumption which deprives one of the right to esent evidence to the contrary, or even damages the evi-nce, is counter to the Due Process Clauses of both the deral and State Constitutions.

In this respect, and as a matter of proof and common knowl-ge, it is a well known fact that many places of business nt[5] space in their stores and other establishments to vending chine operators and other third parties who conduct their n businesses in such space, and are entirely independent d separate from the storekeeper or his business.

> "Such space or department becomes, and is, a separate place of business--the business of such third party."
>
> State v. Wood, 242 Ala. 184, 5 So.2d 732, 736.

The State Department of Revenue in interpreting the statute create only a prima facie presumption, thus giving the rekeeper the right to prove that he was not the "operator" of unlicensed machine and not the one on whom the license falls, followed well established rules of construction proved both by this Court and the State Courts.

> "Any reasonable construction of which a statute is susceptible will be indulged to avoid a conflict with the provisions of organic law."

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[5] this case the storekeepers gave the space which was occupied by Appellants' vending machines free of charge, but it was still space occupied separately by the Appellants in these stores.

Henry v. McCormack Brothers Motor Car Company, 232 Ala. 196, 167 So. 256, 258.

"Where the language of a statute is fairly susceptible of two interpretations, one of which will uphold its constitutionality, and the other defeat it, it is our duty to adopt the former, even though it is less natural, ut res magis valeat quam pereat.

"This rule has not been departed from in this jurisdiction (citing numerous cases, 17 So.2d at page 665)..."

Johnston v. State, 245 Ala. 499, 17 So.2d 662, 664, 665.

The matter of the interpretation of the statute involved also eems to be one for the State Courts to decide. The State ourts in this respect, and in construing the statute to create nly a prima facie presumption, have merely followed the stablished rules of construction applicable to such cases.

THE DETERMINATION BY THE REVENUE DEPARTMENT IS SAID TO BE A JUDICIAL ACT.

Under Title 51, Section 131, Code of Alabama 1940 (see 1958 ecompiled Code), the legislature as authorized under Section 39 of the Alabama Constitution of 1901 has given to the State epartment of Revenue in the enforcement and assessment of :ense and other taxes powers of a judicial nature.

"That 'powers of a judicial nature' were conferred upon the Department of Revenue by the act of its creation is not open to question."

Ex parte State ex rel. Attorney General, 252 Ala. 149, 39 So.2d 669, 671.

See also State v. Woodroof, 253 Ala. 620, 46 So.2d 553.
State Tax Commission v. Stanley, 234 Ala. 66, 173 So. 609.
Campbell v. State, 242 Ala. 215, 5 So.2d 466.

Moreover, under Title 51, Sections 131 and 140, Code of Alabama 1940, procedure is outlined for both hearings before the Department and appeals from its determinations and assessments. Such procedure has also been upheld as meeting the requirements of Due Process. Ex parte State ex rel. Attorney General, 252 Ala. 149, 39 So.2d 669.

> "If an act of the legislature is repugnant to the Constitution, the courts have the power, and the duty, so to declare it."
>
> State v. Nelson, 210 Ala. 663, 98 So. 715.
>
> 4 Ala. Digest, Constitutional Law, Key No. 45, page 384, and cases cited.

It is, however, the duty of a court in this respect to save the statute and uphold it if it is fairly susceptible to two interpretations, one of which will uphold its constitutionality, and to adopt such interpretation to give the statute validity.

> Henry v. McCormack Brothers Motor Car Company, 232 Ala. 196, 167 So. 256, 258.
> Johnston v. State, 245 Ala. 499, 17 So.2d 662, 664, 665.

This, of course, is the general rule of construction which has been adopted in all jurisdictions.

SOME COURTS HAVE HELD THAT THE CREATION BY THE LEGISLATURE OF A CONCLUSIVE PRESUMPTION CUTTING OFF ALL PROOF IS AN ENCROACHMENT BY THE LEGISLATURE ON THE JUDICIARY.

> "The legislature does not possess the power to declare what shall be conclusive evidence of a fact, as such a declaration would be an invasion of the power of the judiciary . . . The Supreme Court of the United States has held that a statute creating a presumption which operates to deny a fair opportunity to rebut it contra-

venes the Due Process Clause of the Fourteenth Amendment to the Federal Constitution . . . . ." (Emphasis supplied)

Carolene Products Co. v. McLoughlin, 365 Ill. 62, 5 N.E.2d 447.
162 A.L.R. 517.

"Even the legislature itself does not have the power to declare what shall be conclusive evidence contrary to fact. . . . The legislature cannot in this manner provide for the arbitrary exercise of power, so as to deprive a person of his day in court to vindicate his rights. And the law which closes his mouth absolutely when he comes into court is the same, in effect, as the law which deprives him of his day in court." (Emphasis supplied)

Juster Bros. v. Christgau, 214 Minn. 108, 7 N.W.2d 50, 162 A.L.R. 517.

The undisputed evidence in this case clearly shows, and the courts have all so found, that the Appellants were the actual operators of the vending machines involved in this case. The storekeepers who graciously and as an accommodation allowed the Appellants to place and operate their vending machines in their stores without any charge to the Appellants, had nothing to do with the operation of the vending machines and were actually innocent bystanders.

The foregoing being considered we believe that the Appellants under their related topic are a bit mixed up as to who has been encroached upon, and as to whose rights have been violated.

THOSE CHARGED WITH COLLECTING AND ENFORCING THE LICENSE TAX LAWS OF ALABAMA (STATE DEPARTMENT OF REVENUE) HAVE CONSTRUED THE STATUTE FOR APPROXIMATELY TWENTY YEARS TO LEVY THE TAX ON THE ACTUAL OPERATOR OF THE VENDING MACHINE.

The evidence in this case shows that the Department of Revenue has for many years construed the proviso under consideration here to create only a prima facie presumption, and the license tax to be levied under Section 613 on the actual operator of the machine. The position taken by the State Department of Revenue that the presumption is a prima facie one, which can be rebutted by proper proof as to who the actual operator of the unlicensed vending machine is, and particularly by the storekeeper that he is not the operator, is certainly not a new one, but one that practically goes back to the inception of the amendment in 1947.

The Department in this respect has followed the case of State v. Wood, 242 Ala. 184, 5 So.2d 732, 735, and Quarterly Reports of the Attorney General (Alabama) Volumes 55 and 84, pages 29, 31 and 29, 32, 33, respectively. All of these authorities clearly hold that the license tax under Section 613 is levied on the actual operator of the vending machine. The Attorney General of Alabama in effect affirming the Department's long standing interpretation of the proviso to create only a prima facie presumption, in his opinion reported in Quarterly Report of the Attorney General, Volume 84, pages 29, 32 and 33, and dated September 6, 1956, pointed out that to construe this presumption to be a conclusive one would be in derogation of Due Process, and caused the 1947 amendment to Section 613 to be unconstitutional.

The impression which the Appellants obviously wish to make is that the interpretation of the proviso by the Revenue Department is something that the Department has just sprung on them. This is pure conjecture not supported by any material evidence, and in fact is entirely contrary to the evidence. Moreover, this long standing interpretation of the amendment and the statute by the Department has been approved by both the Circuit Court of Montgomery County and the Alabama Supreme Court. (See Appendix "A," page 36, in the Appellants' Jurisdictional Statement.)

In addition, the established rule, and one of general application, is that the long established interpretation of a statute by those charged by the legislature with its administration and enforcement is entitled to be given great weight in determining the true meaning of the statute.

Great Northern Life Insurance Company v. Reid, 136 F.2d 44, 47.
State v. Hobbie Grocery Company, 225 Ala. 151, 142 So. 46.
Dixie Coaches v. Ramsden, 238 Ala. 285, 190 So. 92, 94.

The general axiom is that all persons are charged with knowing the law. The Alabama License Tax Laws, Title 51, Sections 450, 831, as amended, and 834, Code of Alabama 1940, expressly require that a person procure a license, where one is called for, before engaging in the business or doing the act for which the license is required.

There is no indication whatsoever that the Appellants ever made any inquiry as to what their status under the State License Laws might have been or any attempt to pay the licenses. The question arose only when the state agents finally found the Appellants' vending machines unlicensed and in operation in various business establishments in this State. That it was not the duty of the state agents to catch

the Appellants in this respect in order for the licenses to become due is certainly a well established proposition of law in this State as well as in other jurisdictions. Griffin et al. v. Edwards, as Commissioner of Revenue, 260 Ala. 12, 68 So.2d 705, 708, 709.

In view of the foregoing, the interpretation placed on the statute was not new or retrospective, but was of long standing.

STATUTORY MEANING IS UNCHANGED. THE WORD "SHALL" WHEREVER APPEARING IN THE AMENDMENT HAS BEEN CONSTRUED, AND STILL IS, AS PERMISSIVE AND THE EQUIVALENT OF "MAY."

The legislature in amending the statute in 1965 in deleting the phrase "shall be conclusively presumed to be the operator of such machine . . ." has not changed the meaning of the statute. If the word "shall" is deemed to be mandatory, then the 1947 amendment to the statute would still create a conclusive presumption without giving the storekeeper or owner of the establishment the right to rebut same or prove otherwise, despite such deletion.

The statute itself (Section 613) levies the license on the "operator" of the vending machine, with the full right of the person involved to prove that he is not the operator of the vending machine. In other words, it would have to be established by proper evidence that a person was the "operator" of a vending machine, and he would certainly have the right to refute a charge that he is the operator of the machine and the taxpayer under the general provisions of the statute.

The proviso enacted in 1947 is an exception to the general provisions of the statute, and could readily be left out of Section 613 entirely. In fact it would improve Section 613 to strike this proviso in its entirety. It is of doubtful validity in

any respect in treating storekeepers differently from other operators of vending machines or persons in the same class. This seems clearly a discrimination against persons in the same class. However, to go a step further in depriving them of their day in court and in not allowing them to vindicate their rights would certainly make that part of the statute and the entire 1947 amendment unconstitutional.

The amendment to this proviso in 1965 in deleting the reference to the presumption being a conclusive one then has not changed the picture. The proviso as amended in 1965 in providing that the operator of the place of business "shall be liable for the license therefor," where an unlicensed machine is found there, still conclusively presumes that he is the "operator of the machine" on which the license is levied under Section 613 itself. It also deprives the storekeeper or operator of the place of business of his day in court and his right to rebut such presumption, just as much so as if the proviso still especially provided that the presumption created thereby was a "conclusive presumption."

The 1965 amendment, although not being relevant to this case anyway, then has not changed the situation in the least. If the word "shall" is to be held to be mandatory as used therein, it would still create in effect a conclusive presumption. If on the other hand, the word is still to be construed as being interchangeable with "may," and to suggest that which is permissive, as the Department of Revenue and Alabama Courts have construed it, then the result would still be the same.

At any rate, the construction of the proviso under both the 1947 and 1965 amendments to Section 613, appears to be a matter to be finally decided by the State Courts.

CONCLUSION

It, therefore, clearly appears that the contentions made by the Appellants in their jurisdictional statement and brief are purely matters of the interpretation of the 1947 amendment to Title 51, Section 613, Code of Alabama 1940, a state statute, and matters for the State Courts alone to resolve. No substantial question or substantial Federal question requiring the decision of this Court is involved. The appeal should be dismissed or in the alternative the decision of the State Court should be affirmed.

Respectfully submitted,

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PROOF OF SERVICE

I, William H. Burton, of Counsel for the Appellee hereby certify that on the 9th day of June, 1967, I served notice of the foregoing and said motion to dismiss or to affirm on Honorable Robert E. Varner, Room 415 - 424, First National Bank Building, Montgomery, Alabama, as Counsel for the Appellants, by mailing a copy to him in a duly addressed envelope, with first class postage prepaid, United States Mail.

Wm. H. Burton

WILLIAM H. BURTON, Of Counsel for Appellee